

Agenda

Item #2



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: May 18, 2010

Re: Endorsements/Request for Advice by Rep. Thomas Saviello

This memo provides you with background information on a request for advice by Rep. Thomas Saviello. The staff does not believe it can offer definitive advice on the question he has posed.

Rep. Saviello is completing his fourth term as State Representative in House District 90 (Wilton and communities north) and is running for the State Senate, District 18. Rep. Saviello will be the Republican nominee in the general election, and is participating in the Maine Clean Election Act (MCEA) program. He will receive \$19,078 in June for the general election. As an MCEA candidate he is not permitted to accept cash or in-kind contributions.

Rep. Saviello wishes to endorse the three Republican House candidates in his area. They may be interested in sending mailings to voters in the three House districts citing his endorsement. He expects that the mailings would refer to him as "Representative Tom Saviello" and that his candidacy for State Senate would not be mentioned. Rep. Saviello would not expect to contribute to the cost of the mailings. He asked whether that would be permissible under Maine campaign finance law. The question is posed by Rep. Saviello, and not by the House candidates.

I raised two cautions to Rep. Saviello. First, someone might consider that the paid mailings mentioning his name and his current legislative office that are sent within the Senate district could constitute an in-kind contribution to his Senate campaign because

they will increase his name recognition – particularly outside the House district he currently represents.¹ Rep. Saviello repeated that the mailings would not mention his candidacy for the State Senate and would be designed to help the House candidates, not him.

Second, I mentioned that if any of the House candidates are participating in the MCEA program, the Commission’s expenditures guidelines (attached) would forbid them from using public funds they received to “assist in any way the campaign of any [other] candidate”

Relevant Law

Definition of Contribution

In the Election Law, a contribution to a candidate is defined as:

A gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing the nomination or election of any person to state, county or municipal office (21-A M.R.S.A. § 1012(2)(A)(1)) (emphasis added)

The Commission’s rules describe in-kind contributions as:

Unless specifically exempted under Title 21-A M.R.S.A. §§ 1012 and 1052 or this section, the provision of any goods or services without charge or at a charge that is less than the usual and customary charge for such goods or services is an in-kind contribution. Examples of such goods and services include, but are not limited to: equipment, facilities, supplies, personnel, advertising, and campaign literature. If goods or services are provided at less than the usual and customary charge, the amount of the in-kind contribution is the difference between the usual and customary charge and the amount charged the candidate or political committee. (Commission Rules, Chapter 1, Section 6(4)) (emphasis added)

¹ My caution was based on the 2008 complaint filed by the Maine Democratic Party concerning business advertising by House candidates Les Fossel and William Dow, and because of the 2008 complaint filed by the Maine Republican Party concerning the appearance of House candidate Alexander Cornell du Houx in a television advertisement about U.S. Senator Susan Collins’ record on the Iraq War.

Expenditures by Third-Party Persons Coordinated with a Candidate

If a candidate coordinates with an outside person or organization on an expenditure to promote the candidate's election, the candidate has received an in-kind contribution:

Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate. (21-A M.R.S.A. § 1015(5))

Independent Expenditures (statute attached)

Maine Election Law includes an independent expenditure reporting requirement² that covers certain communications to voters. (21-A M.R.S.A. § 1019-B) I tend to think that the statute would not apply to the situation proposed by Rep. Saviello, but I mention it here in case others wish to raise it at the May 27 meeting. I view the reporting requirement as intended to cover communications that are sent to voters independently of the candidates mentioned in the communications. In this case, it appears that Rep. Saviello would be consulted on the House candidates' mailings. So, I believe the relevant question is whether the House candidates would be making a contribution to Saviello's campaign, not whether the House candidates are making an independent expenditure to support him.

Arguments Pro and Con

The Commission staff recognizes arguments for and against concluding that the mailings could be an in-kind contribution to Rep. Saviello.

Against an in-kind contribution. As described by Rep. Saviello, the mailings would not mention his candidacy and would not mention the office of State Senate. Since the House candidates would be paying for the mailings, they would presumably be designed

² The requirement applies to communications to voters which expressly advocate for the election or defeat of a candidate. Also, within the last 35 days before a general election, an independent expenditure is presumed in races involving a Maine Clean Election Act candidate if a communication merely names or depicts a clearly identified candidate.

to help the House candidates. Therefore, there may be insufficient evidence to conclude that the House candidates had any purpose³ to influence the election of Rep. Saviello.

This policy view is consistent with the campaign finance policies and rules adopted in other jurisdictions that are attached:

- guidance on pages 41 and pages 144-45 of the Guide for Congressional Candidates and Committees, published by the Federal Election Commission (based on 100 Code of Federal Regulations 109.21(g)(1))
- guidance on page 4-4 of the 2008 Campaign Manual of the California Fair Political Practices Commission, and
- Administrative Rule 4503.1000 of the Minnesota Campaign Finance and Public Disclosure Board.

In favor of an in-kind contribution. Some candidates may feel that if their opponent appears in a public communication that is paid for by another candidate, the opponent has received something of value merely by virtue of having more voters recognize the opponent's name. This concern about providing a candidate with greater name recognition was part of the rationale for the 2008 complaints mentioned above in footnote 1.

Recommendation by Staff

You may not wish to give specific advice to Rep. Saviello about the proposed mailings, particularly when you know nothing about the content of the mailings and you have received no information from the House candidates concerning the purpose of the mailings.

Nevertheless, in the view of the Commission staff, it would be beneficial for the Commission to give some advice to candidates on the issue of endorsements by other

³ The purpose of influencing the candidate's election is an element in the definition of contribution in 21-A M.R.S.A. § 1012(2)(A)(1) quoted on page 2 of this memo.

candidates, so that candidates know what is permissible in this area. The staff suggests discussion of the following policy:

Campaign materials paid for one candidate which contains an endorsement by another candidate are not contributions to the endorsing candidate, provided that the communication

- *does not mention the candidacy of the endorsing candidate, and*
- *contains no promotional or supportive statements concerning the endorsing candidate.*

We recognize that there may be opposing points of view that ought to be considered, including caution that any general exemption for endorsements could evolve into a loophole that candidates would exploit to assist other candidates.

From: Tom Saviello [mailto:drtom16@hotmail.com]
Sent: Tuesday, May 11, 2010 1:48 PM
To: Wayne, Jonathan
Subject: question for the Commission

Jonathan, I would like the Commission to address the following question. Can my name appear in mailings paid for by three Republican House candidates in my area. I support their election and would like to endorse them. These House candidates may be interested in sending mailings that would include this endorsement.

As you know I am a candidate for State Senate. My expectation is that the mailings would refer to me as "Rep. Tom Saviello" and that the mailings would not mention my candidacy or the State Senate race. It is my strong feeling that my endorsement would benefit the House candidates and not me.

I do not plan to expend any money to support these mailings.

It is my understanding the Commission does not have a policy concerning candidates appearing in mailings or advertisements paid for by other candidates. So, the staff of the Commission views this as an unsettled question. In your view is that, in the abstract (based on my verbal description of the mailings), the staff of the Commission would probably take the view that the mailings by the House candidates do not constitute an in-kind contribution to your Senate campaign because they do not mention your candidacy or the State Senate.

However, your view would not be binding on the Commission members if a complaint were ever filed on the subject.

Your advice was for me to ask the Commission itself for an answer. I would ask you to put this question in front of the Commission on May 27th asking their advice. Via this email I asking that this be done.

Thank you, Thomas Saviello. Please call me at 897-1422 if you have any questions.



2010 EXPENDITURE GUIDELINES

For Maine Clean Election Act Candidates

Candidates must spend Maine Clean Election Act (MCEA) funds for campaign-related purposes and not for other purposes such as the candidate's personal benefit, party-building, or to promote another candidate's campaign.

PERMISSIBLE CAMPAIGN-RELATED EXPENDITURES

Expenditures for "campaign-related purposes" are those which are traditionally accepted as necessary to promote the election of a candidate to political office. Candidates using MCEA funds must also take into account the public nature of the funds, the underlying objectives of the MCEA, and the reasonableness of the expenditures under the circumstances. In Maine, traditional campaign expenses have included:

- Printing and mailing costs;
- Political advertising expenses;
- Campaign communications such as signs, bumper stickers, T-shirts, or caps with campaign slogans, etc.;
- Office supplies;
- Campaign events (e.g., food, rent of tent or hall, etc.);
- Campaign staff expenses;
- Campaign travel expenses, such as fuel and tolls; and
- An entry fee for an event organized by a party committee, charity, or community organization or an ad in an event publication, as long as the expenditure benefits the candidate's campaign.

PROHIBITED EXPENDITURES

Candidates may not use MCEA funds for personal expenses. This means candidates may not borrow from or use MCEA funds for personal or other non-campaign expenses, even if temporarily and with the intention of repaying the funds. Personal expenses are for goods and services that the candidate would otherwise purchase independently of the campaign, such as:

- Day-to-day household food items and supplies;
- Vehicle and transportation expenses unrelated to the campaign;
- Mortgage, rent, or utility payments for the candidate's personal residence, even if part of the residence is being used by the campaign; and
- Clothing, including attire for political functions such as business suits or shoes.

Maine Clean Election Act funds may not be spent to:

- make independent expenditures supporting or opposing any candidate, ballot measure, or political committee;
- assist in any way the campaign of any candidate other than the candidate for whom the funds were originally designated;
- contribute to another candidate, a political committee, or a party committee, other than in exchange for goods and services;
- pay a consultant, vendor, or campaign staff, other than in exchange for campaign goods or services;
- make a thank-you gift (including a gift card) to a volunteer or supporter;
- compensate the candidate for services provided by the candidate;
- make a donation to a charity or a community organization, other than in exchange for campaign goods or services;
- promote political or social positions or causes other than the candidate's campaign;
- pay civil penalties, fines, or forfeitures to the Commission, or defend the candidate in enforcement proceedings brought by the Commission; or
- assist the candidate in a recount of an election.

GUIDELINES ON SELECTED ISSUES

Electronics and Other Personal Property. Goods purchased with MCEA funds that could be converted to personal use after the campaign (e.g., computers, fax machines, and cellular telephones) must be reported on Schedules B and E of the candidate reporting form. No later than 42 days after the final report for the campaign, the goods must be sold at fair market value and the proceeds returned to the Maine Clean Election Fund. Candidates are welcome to lease electronic and other equipment.

Food. Candidates may spend a reasonable amount of MCEA funds on food for campaign events or to feed volunteers while they are working. Legislative candidates may not use MCEA funds to purchase food that is consumed only by the candidate and/or the candidate's spouse. Gubernatorial candidates may use MCEA funds to purchase meals for the candidate and/or the candidate's spouse if associated with travel for campaign purposes.

Car Travel. MCEA campaigns may reimburse the candidate or campaign workers for their car travel, as long as the person reimbursed has kept a travel log. For 2010, the campaign may make a travel reimbursement up to the number of miles traveled (as reported in the log) multiplied by \$0.44. Campaigns must keep the travel logs for two years, and provide them to the Commission if requested. Candidates and their spouses or domestic partners may spend any amount of their personal funds for campaign travel without seeking reimbursement. Other individuals may spend up to \$100 of their personal funds to pay for travel without making a contribution to the campaign.

Lodging. Candidates may use MCEA funds to pay for lodging if necessary for campaign purposes, but must keep lodging expenses reasonable.

Post-Election Notes and Parties. Candidates may spend up to the following maximum amounts of MCEA funds on post-election parties, thank you notes, or advertising to thank supporters or voters: \$250 for State Representative candidates, \$750 for State Senate candidates, and \$2,500 for gubernatorial candidates. Candidates may also use personal funds for these purposes.

Campaign Training. Candidates may use MCEA funds for tuition or registration costs to receive training on campaigning or policy issues.

Salary and Compensation. Candidates may use MCEA funds to pay for campaign-related services by staff or consultants, provided that compensation is made at or below fair market value and sufficient records are maintained to show what services were received. Documentation must include a description of the labor performed by the staff member or consultant, and an itemization of any goods or services purchased from other vendors including date, vendor, and amount.

REQUIRED RECORD-KEEPING

The MCEA requires participating campaigns to keep bank or other account statements for the campaign account covering the duration of the campaign. For every expenditure of \$50 or more, the campaign must also keep:

- (1) an invoice from the vendor stating the particular goods or services purchased, and
- (2) a cancelled check, cash receipt, or other acceptable proof that the vendor received payment.

For any services provided to the campaign by a vendor for which the campaign paid \$500 or more for the election cycle, the campaign must keep an invoice, timesheet, or other document specifying in detail the services the vendor provided, the amount paid and the basis for the compensation paid by the campaign. Please select a treasurer who will be responsible about keeping these records.

AUDITING AND COMPLIANCE

In 2010, the Commission staff will audit all gubernatorial candidates receiving MCEA funding and at least 20% of MCEA legislative candidates. The staff will review all receipts and expenditures disclosed by MCEA candidates in campaign finance reports. The Commission frequently requests additional information from candidates to verify that public funds were spent for campaign-related purposes. Candidates who misuse public funds may be required to repay some or all public funds received, may be liable for civil penalties, and may be referred to the State Attorney General for possible criminal prosecution.

date on the credit card billing statement where the charge first appears.

- Outside of these time limits, the payments are in-kind contributions. 116.5(b); AO 2003-31. See Chapter 13, Section 11, "Reporting Reimbursed Advances of Personal Funds" for reporting rules.

5. Vendor Discounts on Food and Beverages

A vendor of food or beverages (even if incorporated) may sell food and beverages to a campaign at a discount. The amount charged must at least equal the vendor's cost for the items. If the value of the discount—the difference between the normal charge and the amount paid by the campaign—does not exceed \$1,000 per candidate, per election, the discount is not considered a contribution. Discounts exceeding \$1,000, however, are in-kind contributions and must be reported as such. A corporate vendor may not exceed the \$1,000 discount limit since corporate contributions are prohibited. 100.78 and 114.1(a)(2)(v).

6. Support from Other Campaigns

* This section describes ways in which campaigns may assist one another without making a contribution. For the rules on campaign-to-campaign contributions, see Chapter 4, Section 1 under the subheading, "Contributions from Other Candidates."

Shared Expenses

Campaigns may share common expenses (e.g., rent for a shared headquarters or printing for a brochure that promotes each campaign) without a contribution resulting, as long as each committee pays its attributed portion of the costs. If one committee pays a bill, the other committees involved in the expense must reimburse that committee for their portion of the expense within a reasonable period of time to avoid a contribution. See AOs 2007-24, 2004-37, 2004-36

and 2004-1. Note that payments by nonfederal campaigns for shared expenses involving public communications must be made from funds that are subject to the limitations, prohibitions and reporting requirements of the Act. 300.71.

"Coattail" Support in Campaign Materials

Under the "coattail" provision of the *Federal Election Campaign Act*, a federal candidate may be mentioned in campaign materials produced by another federal candidate's campaign or by the campaign of a nonfederal candidate. The committee making the expenditure must report it, but the candidate named in the ad has no reporting responsibility. The payment for the materials is not a contribution to the referenced federal candidate provided that the guidelines below are followed.

Example: A U.S. House campaign may produce a yard sign that includes the name of a U.S. Senate candidate without allocating a portion of the cost as an in-kind contribution to that candidate as long as the conditions listed below are met.

Guidelines to Qualify for Exemption

- The materials must be limited to items such as pins, bumper stickers, handbills, brochures, posters and yard signs;
- The materials must be distributed by volunteers (for example, by hand) or by mail using lists developed by the candidate's campaign (but not by direct mail—see below); and
- The materials may not be distributed through public political advertising such as broadcast media, newspapers, magazines, billboards or direct mail (a mailing by a commercial vendor or made from a commercial list).

Note that the portion of the cost allocable to a federal candidate must be paid from funds subject to the limits and prohibitions of the Act, even if a nonfederal campaign pays for the materials. 100.88(a) and (b) and 100.148.

Endorsements and Solicitations by Federal Candidates

A public communication in which a federal candidate endorses, or solicits funds for, another candidate for federal or nonfederal office does not result in a contribution to the endorsing (or soliciting) candidate unless the communication promotes or supports the endorsing (or soliciting) candidate or attacks or opposes his opponent in the election. 109.21(g). For more information, see Appendix D, Communications.

7. Party Support

In addition to making contributions (up to \$5,000 per election as a multicandidate committee), party committees may support a candidate through other activities described below. These other activities are reportable by the political party committee but not by the campaign of the candidate receiving the support. Note that some of these activities may trigger additional reporting responsibilities or funding provisions for the party committee. For detailed information, see the *Campaign Guide for Political Party Committees*.

Coordinated Party Expenditures

The Act creates a special exception to the contribution limits for certain party activities supporting candidates. 2 U.S.C. §441a(d).¹ The national party committee and the state party committee each have an additional special contribution limit for coordinated party expenditures made in connection with the general election campaigns of U.S. House and Senate candidates. 109.32. (Coordinated party expenditures are also called “441a(d) expenditures” because they are provided for in 2 U.S.C. §441a(d) of the *Federal Election Campaign Act*.)

Although these expenditures may be coordinated with a campaign, the party committee must actually make the expenditure on behalf of the

campaign; money given directly to the candidate's campaign is not a coordinated party expenditure.

Party Expenditure Limits

The party's national committee has a spending limit for each U.S. Senate and House nominee in the general election. See 109.35(c). The national committee may designate (in writing) the party's national Senatorial Committee or national Congressional Committee to spend its allowance with respect to a particular nominee, but those committees do not have separate spending limits. 109.32(b) and 109.33; see also AO 1976-108. The national committee may also designate a state or local party committee to make its expenditures. 109.33(a).

A state party committee has a separate spending limit for each Senate and House general election nominee seeking election in that state. The state committee may designate (in writing) a national party committee to spend its allowance with respect to a particular nominee.

Although local party committees have no separate spending allowance, they may be designated in writing by either the national committee or the state committee to make coordinated party expenditures. 109.33(a) and (b)(1). When making coordinated party expenditures, party organizations that are not federally registered political committees must nevertheless use funds that are permissible under the *Federal Election Campaign Act*. 102.5(b)

Coordinated party expenditure limits for Senate and House candidates are calculated as follows:²

- **Senate Candidate:** State voting age population x 2 cents, multiplied by the Cost of Living Adjustment (COLA); or \$20,000 multiplied by the COLA, whichever is greater.
- **House Candidate:**³ \$10,000 multiplied by the COLA, or, in states with only one representative, the same as the Senate limit.
- The Commission publishes in the *Federal Register*, the *FEC Record* and on the Commis-

¹ This special provision creates, in part, an exception to the above contribution limits. That is, without special treatment, political parties ordinarily would be subject to the general limitation on contributions by a multicandidate political committee.

² The Cost of Living Adjustment (COLA) has a considerable effect on party spending limits. For example, the spending limit for a House candidate for a special election in 2007 was \$40,900.

³ The limit applies to candidates for Delegate (American Samoa, District of Columbia, Guam, Virgin Islands) and Resident Commissioner (Puerto Rico). 109.32(b)(2)(ii).

tion of the communication. 109.21(d)(5).⁷ See "Safe Harbor for Use of a Firewall" and "Safe Harbor for Publicly Available Information," below.

Dissemination, distribution or republication of campaign material.

A communication that republishes, disseminates or distributes campaign material only satisfies the first three conduct standards on the basis of the candidate's conduct—or that of his or her committee or agents—that occurs after the original preparation of the campaign materials that are disseminated, distributed or republished. 109.21(d)(6).⁸

Agreement or formal collaboration.

Neither agreement (defined as a mutual understanding on any part of the material aspect of the communication or its dissemination) nor formal collaboration (defined as planned or systematically organized work) is necessary for a communication to be a coordinated communication. 109.21(e).

Safe Harbor Provisions to the Conduct Prong

Safe Harbor for Responses to Inquires About Legislative or Policy Issues.

A candidate's or political party committee's response to an inquiry about that candidate's or party's positions on legislative or policy issues,

⁷ Under the rules, a candidate or political party committee would not be held responsible for receiving or accepting an in-kind contribution that resulted only from conduct described in the Employment of Common Vendor and Former Employee/Independent Contractor sections. 109.21(d)(4) and (d)(5). However, the person paying for a communication that is coordinated because of conduct described in these sections would still be responsible for making an in-kind contribution for purposes of the contribution limitations, prohibitions and reporting requirements of the Act. 109.21(b)(2).

⁸ Please note that the financing of the distribution or republication of campaign materials, while considered an in-kind contribution by the person making the expenditure, is not considered an expenditure made or a contribution received by the candidate's authorized committee unless the dissemination, distribution or republication of campaign materials is coordinated. Additionally, republications of campaign materials coordinated with party committees are in-kind contributions to such party committees, and are reportable as such. 109.23(a).

which does not include discussion of campaign plans, projects, activities or needs, will not satisfy any of the conduct standards. 109.21(f).

Safe Harbor for Publicly Available Information.

The standard for substantial discussion, material involvement, use of a common vendor and involvement of a former employee are not satisfied if the information used in creating or distributing the communication was obtained from a publicly available source. Publicly available sources include, but are not limited to:

- Newspaper or magazine articles;
- Candidate speeches or interviews;
- Transcripts from television shows;
- Press releases;
- A candidate or political party's web site; and
- Any publicly available web site.

109.21(d)(3).

Safe Harbor for Use of a Firewall.⁹

None of the conduct standards is satisfied if the vendor, political committee, former employee or contractor implements a firewall. The firewall must effectively prohibit the flow of information between employees or consultants providing service to the person paying for the communication and those employees or consultants providing services to a political party committee or to the candidate who is clearly identified in the communication or to the campaign of the candidate opposing the candidate clearly identified in the communication. The firewall must be described in a written policy statement that is distributed to all employees, consultants and clients affected by the policy. 109.21(h).

Safe Harbor for Candidate Endorsements and Solicitations.

A federal candidate may endorse or solicit funds for a candidate for federal or nonfederal office in a public communication without the communication

⁹ The rules at 109.21(h) regarding the establishment of a firewall are the subject of a litigation challenge in *Shays et al. v. FEC*, 500 F.Supp. 2d 10, 2007 WL 2616689 (D.D.C. Sept. 12, 2007) (Shays III). On 9/12/07, the District Court remanded this regulation to FEC for reconsideration. The FEC filed a notice of appeal with the Court of Appeals for the D.C. Circuit on October 16, 2007.



being considered a "coordinated communication" with respect to the endorsing or soliciting candidate, so long as the communication does not promote or support the candidate making the solicitation and does not attack or oppose his/her opponent. The safe harbor described in this paragraph also covers candidate solicitations for other political committees (including party committees) and candidate solicitations for certain tax-exempt organizations as described at 11 CFR 300.65, 109.21(g)(1) and (2).

3. Independent Expenditures

Individuals and political committees may support (or oppose) candidates by making independent expenditures. Independent expenditures are not contributions and are not subject to contribution limits. Compare 109.20(b). (However, contributions made to a committee or to another person making independent expenditures are subject to limits, as explained at the end of this section.)

Because they are expenditures under the Act, independent expenditures must be paid for with federally permissible funds.

Defined

An independent expenditure is an expenditure for a communication, such as a web site, newspaper, television or direct mail ad, that:

- Expressly advocates the election or defeat of a clearly identified federal candidate; and
- Is not coordinated with a candidate, candidate's committee, party committee or their agents. (See section 1, Coordination, above.) 100.16(a).

Clearly Identified Candidate

A candidate is "clearly identified" if the candidate's name, nickname or image appears, or the identity of the candidate is otherwise apparent. Examples include: "the President," "your Congressman," "the Democratic Presi-

dential nominee," "the Republican candidate for Senate in the State of Georgia." 100.17.

Express Advocacy

"Express advocacy" means that the communication includes a message that unmistakably urges election or defeat of one or more clearly identified candidate(s). There are two ways that a communication can be considered express advocacy: by use of certain "explicit words of advocacy of election or defeat" and by the "only reasonable interpretation" test. 100.22.

Explicit words of advocacy of election or defeat

The following words convey a message of express advocacy:

- "Vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for the U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '08";
- Words urging action with respect to candidates associated with a particular issue, e.g., "vote Pro-Life"/ "vote Pro-Choice," when accompanied by names or photographs of candidates identified as either supporting or opposing the issue;
- "Defeat" accompanied by a photograph of the opposed candidate, the opposed candidate's name or "reject the incumbent"; and
- Campaign slogan(s) or word(s), e.g., on posters, bumper stickers and advertisements, that in context can have no other reasonable meaning than to support or oppose a clearly identified candidate, for example, "Nixon's the One," "Carter '76," "Reagan/Bush." 100.22(a).

"Only Reasonable Interpretation" Test

In the absence of such "explicit words of advocacy of election or defeat," express advocacy (candidate advocacy) is found in a communication that, when taken as a whole and with limited reference to external events, such as

Chapter 4 — Communications

Candidates and committees who are the beneficiaries of independent expenditures do not report them. However, the person making the expenditure may have filing obligations.

(Example) During Joe Winner's campaign, two newspaper advertisements supporting Joe were published without his knowledge or consent. Since the payments for these communications were not made at his behest, they were independent expenditures by the person(s) funding the ads and were not reportable by Joe's campaign. The person(s) who paid for the ads may have a filing obligation.



Endorsements

An endorsement of a candidate or measure **may** become a contribution or an independent expenditure when a payment is made in connection with the endorsement.

(Example) The president of a state police officers' association announces at its annual meeting that the association endorses John Law for Attorney General. Merely making an oral endorsement is not a contribution or independent expenditure to John Law.

Closer to the election, at the request of candidate John Law, the association mails a special flyer to the voters announcing its endorsement of him. Since the mailing was made at the behest of the candidate, the association has now made a nonmonetary contribution to John Law.

Frequently, a candidate will publish his or her endorsement by another official. As long as the communication does not advocate the election of the endorsing official (or the defeat of that official's opponent), a payment made to communicate the endorsement is not a contribution to the endorsing candidate or official, even though the endorsement was made at the behest of both individuals.

(Example) A legislative candidate paid for a mailing which quoted the Governor's verbal endorsement of his candidacy. Although the Governor was also on the ballot, the flyer did not ask voters to vote for the Governor. The flyer was not a contribution to the Governor's committee; nor did the Governor make a contribution to the legislative candidate.

If a candidate pays for a communication supporting his or her own candidacy that also supports or opposes a ballot measure, the payment is not a contribution or independent expenditure made in connection with the ballot measure.

There are times when a candidate pays for a communication which supports another candidate, but the payment is not made at the behest of the endorsed candidate. If the candidate paying for the communication also is included in the communication, and the non-paying candidate is listed on the same ballot as the paying candidate, and the communication is targeted only to the potential voters in the paying candidate's district, no independent expenditure is made.

(Example) Lynda Isherwood, a State Senator running for reelection, sent out a flyer to registered voters in her district asking them to support her candidacy. The flyer also encouraged the voters to vote for Gary Swanson for Governor, although this endorsement was not made at Gary's behest. Because the gubernatorial election and State Senate election would appear on the same ballot for those living in Lynda's district, and the flyer was sent only to voters in Lynda's district, the payment for the flyer is not an independent expenditure.

Non-Contributions

Debates: A payment for a debate or similar forum to which at least two candidates running for the same office are invited is not

4503.1000 CAMPAIGN MATERIALS INCLUDING OTHER CANDIDATES.

Subpart 1. **Inclusion of others without attempt to influence nomination or election.** Campaign materials, including media advertisements, produced and distributed on behalf of one candidate which contain images of, appearances by, or references to another candidate, but which do not mention the candidacy of the other candidate or make a direct or indirect appeal for support of the other candidate, are not contributions to, or expenditures on behalf of that candidate.

Subp. 2. **Multicandidate materials prepared by a candidate.** A candidate who produces and distributes campaign materials, including media advertisements, which include images of, appearances by, or references to one or more other candidates, and which mention the candidacy of the other candidates or include a direct or indirect appeal for the support of the other candidates must collect from each of the other candidates a reasonable proportion of the production and distribution costs.

Statutory Authority: *MS s 10A.02*

History: *20 SR 2504*

Posted: *February 28, 2006*

21-A MRSA § 1019-B. REPORTS OF INDEPENDENT EXPENDITURES

(CONTAINS TEXT WITH VARYING EFFECTIVE DATES)

1. Independent expenditures; definition. For the purposes of this section, an "independent expenditure":

A. Is any expenditure made by a person, party committee, political committee or political action committee, other than by contribution to a candidate or a candidate's authorized political committee, for any communication that expressly advocates the election or defeat of a clearly identified candidate; and [2003, c. 448, §3 (NEW) .]

B. Is presumed in races involving a candidate who is certified as a Maine Clean Election Act candidate under section 1125, subsection 5 to be any expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 21 days, including election day, before a primary election; the 35 days, including election day, before a general election; or during a special election until and on election day. [2007, c. 443, Pt. A, §20 (AMD) .]

[2007, c. 443, Pt. A, §20 (AMD) .]

2. Rebutting presumption. A person presumed under this section to have made an independent expenditure may rebut the presumption by filing a signed written statement with the commission within 48 hours of making the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. The commission may gather any additional evidence it deems relevant and material and must determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

[2003, c. 448, §3 (NEW) .]

3. (TEXT EFFECTIVE UNTIL 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [2003, c. 448, §3 (NEW) .]

B. A report required by this subsection must contain an itemized account of each contribution or expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each contribution or expenditure and the name of each payee or creditor. The report must state whether the contribution or expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the contribution or expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2003, c. 448, §3 (NEW) .]

C. A report required by this subsection must be on a form prescribed and prepared by the

commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2003, c. 448, §3 (NEW) .]

[2003, c. 448, §3 (NEW) .]

3. (TEXT EFFECTIVE 8/1/11) Report required; content; rules. A person, party committee, political committee or political action committee that makes independent expenditures aggregating in excess of \$100 during any one candidate's election shall file a report with the commission. In the case of a municipal election in a town or city that has chosen to be governed by this subchapter, a copy of the same information must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements and matching fund provisions under chapter 14. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [2003, c. 448, §3 (NEW) .]

B. A report required by this subsection must contain an itemized account of each contribution or expenditure aggregating in excess of \$100 in any one candidate's election, the date and purpose of each contribution or expenditure and the name of each payee or creditor. The report must state whether the contribution or expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the contribution or expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [2003, c. 448, §3 (NEW) .]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. [2003, c. 448, §3 (NEW) .]

[2009, c. 366, §5 (AMD); 2009, c. 366, §12 (AFF) .]

SECTION HISTORY

2003, c. 448, §3 (NEW). 2007, c. 443, Pt. A, §20 (AMD). 2009, c. 366, §5 (AMD). 2009, c. 366, §12 (AFF) .

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